



16731
Sept 23, 2009

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
Attn: [REDACTED]

RE: Case No. 2367778
[REDACTED]
[REDACTED]
Dismissed

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. 2367778, which includes your appeal on behalf of [REDACTED] ("Offshore") as operator of the [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$45,000.00 penalty for the following violations:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
33 CFR 160.105	Failure to comply with an order pertaining to the control of vessel or facility operations.	\$22,500.00
33 CFR 160.105	Failure to comply with an order pertaining to the control of vessel or facility operations.	\$22,500.00

The violations are alleged to have occurred on July 18, 2001, after Offshore allegedly failed to comply with two Coast Guard Captain of the Port ("COTP") Orders, COTP Order No. 11-01 and COTP Order No. 12-01, issued by the Coast Guard Captain of the Port, Corpus Christi, Texas, regarding the operation of the [REDACTED].

On appeal, although you do not specifically deny that the violations occurred, you "object to the Decision" for the following reasons: 1) the civil penalty is untimely and unenforceable, 2) the civil penalty that the Coast Guard wishes to assess exceeds the maximum civil penalty allowed by law at the time that the violations occurred, 3) the Coast Guard's delay in initiating civil

penalty action has prejudiced Offshore, 4) Offshore's subsequent "corrective action" warrants significant reduction of the civil penalty, and 5) the Coast Guard has no proof that compliance with the COTP Orders would have cost more than the maximum penalty amount. Your appeal is granted for the reasons discussed below.

Because jurisdictional issues may obviate review of other, substantive issues, I will first address your contentions regarding the timeliness of these proceedings. On appeal, you assert that the instant civil penalty proceedings "are untimely and unenforceable." You support your assertion, in this regard, by citing 28 USC 2462 and *U.S. v. Core Laboratories, Inc.*, 759 F.2d 480 (5th Cir. 1985). In so doing, although you acknowledge that the Coast Guard commenced civil penalty proceedings against offshore within 5 years of the relevant violations, you, nonetheless, note that "even if the Coast Guard assesses a civil penalty in this case, any proceedings filed by the Coast Guard in a United States District Court to recover/enforce the civil penalty would be dismissed for failure to bring such suit within five years." In effect, you argue that although the Coast Guard may still be able to assess a penalty against Offshore for the violations, it will not be able to collect any assessed penalty because the applicable statute of limitations has run and will bar collection in federal court.

A review of the relevant case law shows that there is a split in the federal circuits as to the meaning and application of 28 USC 2462. Among the circuits that have addressed the subject, the Fifth, Ninth and D.C. Circuits have all held that an action to assess or impose a civil penalty must be commenced within five years of the date of the violation giving rise to the penalty. *See U.S. v. Core Laboratories, Inc.*, 759 F.2d 480 (5th Cir. 1985); *Federal Election Com'n v. Williams*, 104 F.3d 237 (9th Cir. 1996); and *3M Co. v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994). As such, for an assessed penalty to be available for collection (as imposed by a federal court), the final assessment and collection action must be commenced within the five year period set forth in 28 USC 2462. On the contrary, decisions of the First, Seventh and Eighth Circuits support the general proposition that the limitation period set forth in 28 USC 2462 does not begin to run until after administrative proceedings have resulted in a final determination. *See U.S. v. Meyer*, 808 F.2d 912 (1st Cir. 1987); *U.S. Dept. of Labor v. Old Ben Coal Co.*, 676 F.2d 259 (7th Cir. 1982); and *U.S. v. Godbout-Bandal*, 232 F.3d 637 (8th Cir. 2000). Given the split in the circuits, I believe that an equitable determination based on the particular facts and circumstances of a case, rather than a strict adherence to either rationale, is appropriate in Coast Guard civil penalty cases.

In this case, the record shows that although the violations at issue occurred on July 18, 2001, civil penalty action was not initiated until the Hearing Officer issued her Preliminary Letter of Assessment on July 13, 2006, nearly five years after the violations at issue occurred. The Coast Guard's civil penalty process is remedial in nature and is designed to achieve compliance through either the issuance of warnings or the assessment of monetary penalties when violations are found proved. Informal assessment procedures, like those used in the Coast Guard's civil penalty program, were developed by agencies to avoid the significant time and manpower requirements associated with formal, on-the-record hearings. In spite of their informality, these proceedings are required to provide the respondent with notice, an opportunity to be heard, a right to present evidence at an informal hearing, and a right of appeal. In 1978, the Coast Guard published its civil penalty procedures at 33 CFR 1.07. These regulations establish

procedures for the assessment of civil penalties for violations of laws and regulations enforced by the Coast Guard. The procedures are remedial in nature and reflect an appropriate balance between the needs of the Coast Guard in addressing a caseload numbering in the several thousands with the need to provide all respondents with due process rights that are consistent with the monetary sanction being considered.

In this case, the record shows that there was a substantial delay in the processing of the case. While the incidents giving rise to the violations occurred in 2001, the Hearing Officer's Preliminary Letter of Assessment was not sent out until nearly five years later. Under such circumstances, I have no doubt that Offshore was prejudiced by the delay which undoubtedly hindered the Company's ability to respond to the alleged violations. While I am mindful that civil penalty action was (just barely) commenced in this case before the five-year time period elapsed, in consideration of the substantial delay and the remedial efforts taken by Offshore, including the firing of the employee ultimately responsible for the violations and the establishment of a company policy mandating compliance with Coast Guard orders, I believe that dismissal of the case is appropriate.

This decision constitutes final agency action in the matter.

Sincerely,

//s//

DAVID J. KANTOR
Deputy Chief,
Office of Maritime and International Law
By direction of the Commandant

Copy: Commanding Officer, Coast Guard Hearing Office
Commanding Officer, Coast Guard Finance Center